1979

The Absoluteness of the First Amendment

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Original Citation

Stephen W. Gard, The Absoluteness of the First Amendment, 58 Nebraska Law Review 1053 (1979)

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I. INTRODUCTION

The search for a general theory of any area of the law needs no defense or apology. Yet, in contrast to the law's ability to tolerate inconsistencies in most fields, the quest for a unifying theory of the freedom of speech clause of the first amendment[1] has a special importance. The reason, no doubt, is simply that "free speech is so close to the heart of democratic organization that if we do not have an appropriate theory for our law here, we feel we really do not understand the society in which we live."[2]

Despite this urgent need, the reality is that today we have no such unifying free speech theory. Instead, the recent decisions of the United States Supreme Court suggest that doctrinal confusion reigns. Thus, for example, the Court's recent handling of the fundamental distinction between governmental regulation of the content of expression and governmental regulation of the time, place and manner of expression has been most unsatisfying. Whether expressed in terms of "categorization" versus "balancing" as a judicial technique,[3] or in terms of a principle of equality,[4] the Supreme Court in *Police Department of Chicago v. Mosley*[5] and *Erznoznik v. City of Jacksonville*[6] indicated that it had a firm grasp on the doctrinal distinction. This impression was belied, however, by the Court's cavalierly perverse application of *Mosley* in *Hudgens v. NLRB*.[7] Moreover, in *Young v. American Mini Theatres,*

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1. U.S. CONST. amend. I: "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."
2. H. KALVEN, THE NEGRO AND THE FIRST AMENDMENT 6 (1965).
3. Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482 (1975).
4. *See* Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1975).
5. 408 U.S. 92 (1972). *See also* Grayned v. City of Rockford, 408 U.S. 104 (1972).
6. 422 U.S. 205 (1975).
7. 424 U.S. 507 (1976).

Inc.,[8] the Court was able to reach a consensus neither on the standards for identifying a content regulation nor on the doctrinal tools to be applied to test the constitutional validity of such a regulation.

Ironically, I would suggest that the cause of the present doctrinal confusion is not that insufficient attention has been paid to technical free speech issues, but rather that modern first amendment thinking has been dominated by "balancers." For these individuals the solutions to difficult issues of constitutional interpretation are developed through treating the first amendment guarantee as just another interest, albeit an important one, to be weighed against countervailing governmental concerns. Thus, Professors Tribe, Karst, and Ely have made it plain that they are not "absolutists." Professor Karst has been explicit in his position that balancing is the appropriate mode of first amendment analysis.[9] Furthermore, the "categorization" approach urged by Professors Tribe and Ely is not absolutist,[10] but can best be described as a form of "definitional balancing" whereby the process of weighing the competing interests results in the emergence of a legal rule which can be applied to future cases.[11]

The poverty of the balancing approach, be it *ad hoc* or definitional in character, stems from its reliance on pragmatic considerations[12] rather than on fundamental principles embodied in the enduring legacy of the founding fathers. Indeed, balancing, by defining the first amendment guarantee only negatively by reference to those governmental interests pragmatically deemed of insufficient importance to outweigh the "interest" in free expression, necessarily denies the existence of any essential meaning which can be derived from the constitutional provision.[13] Simply stated, balancing is not a legal test at all, and does not contribute to the process of open, accountable adjudication. Such an approach not only ignores the purposes of the first amendment as a source of guidance for the interpretation of that constitutional guarantee,

8. 427 U.S. 50 (1976). *See also* FCC v. Pacifica Foundation, 438 U.S. 726 (1978).
9. *See* Karst, *Justice Marshall and the First Amendment*, 6 BLACK L.J. 26 (1978).
10. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 581-82, 602-04 (1978); Ely, *supra* note 3, at 1493 n.44.
11. *See* Nimmer, *The Right to Speak From* Times *to* Time: *First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CALIF. L. REV. 935 (1968).
12. *See* L. TRIBE, *supra* note 10, at 583 ("The 'absolutists' may well have been right in believing that their approach was better calculated to protect freedoms of expression, especially in times of crisis."); Ely, *supra* note 3, at 1500 ("The categorizers, or 'absolutists', were surely right that theirs was the approach more likely to protect expression in crisis times.").
13. *See* DuVal, *Free Communication of Ideas and the Quest for Truth: Toward a Teleological Approach to First Amendment Adjudication*, 41 GEO. WASH. L. REV. 161, 175, 180 (1972); Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424, 1435, 1442-44 (1962).

but also fails to provide any standards for determining what factors are relevant to the balancing process or the relative weight to be assigned to each factor.[14] Balancing is doomed to failure as a mode of constitutional analysis because it necessarily turns the interpretative process upside down and renders everything a matter of "proximity and degree."[15] Principled distinctions are thereby rendered impossible and we are deprived of a workable vocabulary for solving even the simplest of free speech problems.

My point is not that the first amendment should be interpreted as being absolute in scope, nor that the meaning of the guarantee can be derived solely from a literal reading of the not-so-plain words of the constitutional guarantee.[16] Rather, it is simply that "*before* the Court can get to the 'balancing' stage, *before* it can worry about the next case and the case after that (or even about its institutional position) it is under an obligation to trace its premises to the charter from which it derives its authority."[17] Before the Supreme Court can rationally confront the difficult problem of defining the limits of first amendment protection it must, if it intends to convincingly claim that it is engaged in the process of constitutional interpretation, reason from the premise of the essential meaning of the first amendment. The purpose of this article is not to dredge up the old and disreputable argument that the first amendment is an "absolute," but to return to the more profitable enterprise of identifying the core meaning, the absoluteness, of the first amendment and thereby give constitutional principle, perspective and content to first amendment jurisprudence.

II. FREEDOM OF EXPRESSION AND A SELF-GOVERNING PEOPLE

It is doubtful that any effort to explicate a unifying theory of the first amendment can succeed without paying homage to the magnificent attempt by Professor Kalven to formulate a general free speech theory by identifying a core of absolute first amendment protection traceable to the essential role of free expression in preserving the sovereignty of the people in an open society dedicated to the principle of democratic self-government.[18] Professor Kalven

14. *See* DuVal, *supra* note 13, at 173-75, 180; Frantz, *Is The First Amendment Law?—A Reply to Professor Mendelson*, 51 CALIF. L. REV. 729, 746-49 (1963). *Contra*, Barenblatt v. United States, 360 U.S. 109 (1954).
15. Schenck v. United States, 249 U.S. 47, 52 (1919).
16. *But see* Konigsberg v. State Bar, 366 U.S. 36, 61-68 (1961) (Black, J., dissenting); Cahn, *Justice Black and First Amendment "Absolutes": A Public Interview*, 37 N.Y.U. L. REV. 549 (1962).
17. Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 949 (1973) (emphasis in original).
18. *See* Kalven, *The New York Times Case: A Note on "The Central Meaning of*

interpreted the United States Supreme Court's opinion in *New York Times Co. v. Sullivan*[19] as making "a notable shift in constitutional idiom and [providing] a new start for consideration of free-speech problems."[20] For a commentator as astute as Professor Kalven, the primary importance of *Sullivan* was not the narrow holding but the rationale by which the Supreme Court reached its conclusions. Thus, the significance of *Sullivan* was to be found in its recognition of "the central meaning of the First Amendment,"[21] derived from the very nature of an open, democratic society: "that seditious libel cannot be made the subject of government sanction."[22]

The elegance and insight of Professor Kalven's analysis cannot be denied. Certainly the concept of seditious libel is central to a viable free speech theory and its importance derives from the role of expression in a democratic society.[23] The utility of this concept as a starting point for a general free speech theory, however, is not readily apparent. The thesis that "analysis of free-speech issues should . . . begin with the significant issue of seditious libel and defamation of government by its critics"[24] and "follow a dialectic progression from public official to government policy to public policy to matters in the public domain, like art"[25] has at least the appearance of straining the powers of analogical reasoning beyond convincing limits. Indeed, the analogy quickly becomes sufficiently subtle that even as astute an eye as that possessed by Professor Kalven initially failed to recognize it.[26] Thus, it is not an easy matter to rebut the argument of Professor Bork: "[I]f the dialectical progression is not to become an analogical stampede, the protection of the first amendment amendment [*sic*] must be cut off when it reaches the outer limits of political speech."[27] Even if the

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the First Amendment", 1964 SUP. CT. REV. 191. *See also* A. MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT (1948); Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245.

19. 376 U.S. 254 (1964). For a further discussion of *Sullivan*, see notes 139-81 & accompanying text *infra*.
20. Kalven, *supra* note 18, at 194.
21. *Id.* at 208 (quoting New York Times Co. v. Sullivan, 376 U.S. at 273).
22. *Id.* at 209.
23. *See* notes 172-79 & accompanying text *infra*.
24. Kalven, *supra* note 18, at 205.
25. *Id.* at 221.
26. *See* Kalven, *The Metaphysics of the Law of Obscenity*, 1960 SUP. CT. REV. 1, 16:
> Not all communications are relevant to the political process. The people do not need novels or dramas or paintings or poems because they will be called upon to vote. Art and belles-lettres do not deal in such ideas—at least not good art or belles-lettres . . . . Thus there seems to be a hiatus in our basic free-speech theory.
27. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 27 (1971).

analogy to seditious libel does not justify limiting the reach of the first amendment to expression which is explicitly political, it certainly seems unprofitable in the formulation of a doctrine to explain the constitutional protection afforded to social, artistic, literary and commercial expressions.[28] It should come as no surprise then that the Supreme Court has not found this analogical mode of analysis to be relevant in its evaluation of governmental regulations which penalize sexually explicit speech[29] or even expressions which are libellous of private individuals.[30] The concept of seditious libel is simply too restricted to support a general theory of the first amendment.

Ultimately, I believe Professor Kalven was correct in his thesis that a unifying free speech theory should be premised on the function of free expression in a self-governing democracy. Unfortunately, Professor Kalven embraced too narrow a conception of self-government and consequently defined the essential meaning of the first amendment too narrowly. Before explaining where I risk parting company with Professor Kalven's analysis, however, it is important to put aside two alternative values which have traditionally been offered in support of the constitutional protection afforded freedom of expression: that freedom of expression is essential for either the discovery and advancement of truth[31] or for the assurance of individual happiness or self-fulfillment.[32] Neither of these alternatives provides an adequate or intellectually coherent rationale for the constitutional protection of our most precious civil liberty.

The metaphor of a marketplace of ideas free of governmental regulation would not be objectionable if it were intended simply to express a conclusion that the expression of ideas should not be abridged by the government. Unfortunately, the metaphor has not

28. *See, e.g.*, Abood v. Detroit Bd. of Educ., 431 U.S. 209, 231 (1977) ("[O]ur cases have never suggested that expression about philosophical, social, artistic, economic, literary, or ethical matters . . . is not entitled to full First Amendment protection."); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) (commercial speech protected by first amendment). *But cf.* Friedman v. Rogers, — U.S. —, 99 S. Ct. 887 (1979) (Court held that a Texas law prohibiting the practice of optometry under a trade name was a constitutionally valid state regulation).

29. *See, e.g.*, Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976); Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973).

30. *See, e.g.*, Time, Inc. v. Firestone, 424 U.S. 448 (1976); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

31. *See, e.g.*, Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); J.S. MILL, ON LIBERTY (Oxford U. Press Ed. 1859).

32. *See, e.g.*, L. TRIBE, *supra* note 10, at 578-79; Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45 (1974).

been offered as a conclusion, but rather as a premise for the interpretation of the first amendment free speech guarantee. As a premise, the notion that the value of free expression is measured by its utility in advancing truth and knowledge in a marketplace of ideas has been frequently examined and found intellectually inadequate.[33] One need not deny that freedom of expression often will advance knowledge and lead to the intelligent resolution of public policy choices in order to be troubled by the naivete displayed by the adherents to this theory. Any reliance on empirically unprovable assumptions that true ideas, assuming that we could successfully identify these, will always emerge victorious over competing false ideas is a slender reed upon which to justify the constitutional protection for first amendment freedoms.

The more fundamental difficulty with premising the first amendment protection of expression on a marketplace of ideas notion is that it immediately invites the obvious analogy which suggests that the government should intervene and regulate the marketplace of ideas in the same manner and for the same reasons that the government has long regulated the marketplace of goods.[34] The problem here is not merely the pragmatic danger that governmental regulation is often inefficient, misdirected and counter-productive.[35] Rather, the more basic objection to this theory, and to the similar equal liberty theories of Professors Rawls and Karst,[36] is that it legitimates, and perhaps even mandates, the governmental burdening of the expression of some ideas on the explicit rationale of the desirability of favoring other ideas in order to achieve some nebulous concept of fair competition or equality. Fortunately, the Supreme Court, in two recent decisions, has explicitly rejected as fundamentally incompatible with the first

33. *See, e.g.*, L. TRIBE, *supra* note 10, at 576-77; Baker, *Scope of the First Amendment Freedom of Speech*, 25 U.C.L.A. 964 (1978); DuVal, *supra* note 13; McCloskey, *Liberty of Expression: Its Grounds and Limits*, 13 INQUIRY 219 (1970).

34. *See, e.g.*, Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969); B. OWEN, ECONOMICS AND FREEDOM OF EXPRESSION: MEDIA STRUCTURE AND THE FIRST AMENDMENT (1975); Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641 (1967); Coase, *Advertising and Free Speech*, 6 J. LEG. STUDIES 1 (1977).

35. *See* Coase, *supra* note 34, at 7:

> If a federal program were established to give financial assistance to boy scouts to enable them to help old ladies cross busy intersections, we could be sure that not all the money would go to boy scouts, that some of those they helped would be neither old, nor ladies, that part of the program would be devoted to preventing old ladies from crossing busy intersections and that many of them would be killed because they would now cross at places where, unsupervised, they were at least permitted to cross.

36. *See* J. RAWLS, A THEORY OF JUSTICE 224-26 (1971); Karst, *supra* note 4, at 43-52.

amendment, the notion that the government can permissibly burden the expression of some ideas solely on the basis of their content in order to give an equal or fair chance to other, governmentally preferable, ideas.[37]

The analogy between the marketplace of ideas and the marketplace of goods also raises the spector of governmental trust-busting in the field of ideological messages and suggests that if an idea appears to be gaining an undesirable degree of acceptance in the marketplace the government should intervene. Once such content censorship of communicative activity by the government is endorsed in principle, then only pragmatic considerations limit the scope of governmental authority.[38] Contrary to the implication of Professor Rawls, for instance, the suppression of the freedom of expression of Jehovah's Witnesses because of official abhorrence of the ideas they espouse should not be constitutionally permissible as a matter of principle.[39] Neither the marketplace of ideas concept nor Professor Rawls' theory of equal liberty supply such a principle.[40]

Another theory of the freedom of expression guarantee of the first amendment is that it is premised on the desirability of individual happiness and self-fulfillment.[41] In this view, the importance of the first amendment is that it serves, along with other constitutionally-ascribed values, to preserve individual autonomy.[42] Not only does this theory assume that the individual knows better than the government what will make people "feel better" or become self-fulfilled, but, more significantly, it fails to distinguish between

37. *See* Buckley v. Valeo, 424 U.S. 1, 39 (1976); Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974). *But see* Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).

38. *See* J. RAWLS, *supra* note 36, at 216-21.

39. *Cf.* Wooley v. Maynard, 430 U.S. 705 (1977) ("Live Free or Die" slogan contrary to beliefs); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (reciting pledge of allegiance mandatory in school); Cantwell v. Connecticut, 310 U.S. 296 (1940) (on street solicitation of money for religion).

40. Dennis v. United States, 341 U.S. 494 (1951), is another decision which Professor Rawls' theory of equal liberty would require that we accept as a matter of principle on the grounds that the government rationally determined that there was a significant danger that the Communist Party, by the sole means of peaceful persuasion, might have converted large numbers of Americans to its ideological views. *See* J. RAWLS, *supra* note 36, at 219 ("[T]he intolerant sect may be so strong initially or growing so fast that the forces making for stability cannot convert it to liberty. This situation presents a practical dilemma which philosophy alone cannot resolve."). The Supreme Court has explicitly rejected Professor Rawls' views. *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444 (1969); Yates v. United States, 354 U.S. 298 (1957). *Cf.* Masses Publishing Co. v. Patten, 244 F. 535 (1917) (mailings of revolutionary magazine).

41. *See* L. TRIBE, *supra* note 10, at 578-79; Richards, *supra* note 32.

42. *Id.*

the governmental regulation of expression and the governmental regulation of action, thus robbing the first amendment guarantee of any principled foundation.[43] The argument that "the right to say what one thinks is merely a special instance of every individual's freedom to do as he pleases" renders "the freedom of speech clause as incomprehensible as I should find a provision forbidding Congress to abridge 'the freedom of action.' "[44] The difficulty with this theory, aside from its essential incoherence, is that it violates our common conception of the importance of free expression[45] by implying that, as a matter of principle, the government is empowered to limit expression to the same extent that it may limit action for the public good.[46] Historically, the consequences of such a theory have proven disastrous for our first amendment freedoms.[47] This has been true because the supporters of the self-fulfillment theory must necessarily rely solely on pragmatic reasons to justify meaningful judicial protection for the freedom of expression guarantee of the first amendment.[48] It is sadly ironic that Professor Tribe, a proponent of the self-fulfillment theory, criticizes the democratic self-government rationale on the grounds that it relegates non-political speech to only substantive due process protection[49] but then offers in its place a theory which relegates *all* expression

43. *See* Bork, *supra* note 27, at 25.
44. Frantz, *supra* note 14, at 734-35.
45. *See* J.S. MILL, *supra* note 31, at 69 ("No one pretends that actions should be as free as opinions.").
46. Professor Rawls attempts to avoid this difficulty by arguing that when the government penalizes the expression of an idea on the grounds that the idea will cause a corruption of the faith or beliefs of the people the government's action is illegitimate because it does not rely on "modes of reasoning commonly recognized." J. RAWLS, *supra* note 36, at 215. The difficulty with this analysis is that historically such modes of reasoning have been commonly recognized. In addition, absent some special significance attributed to the expression of ideas, it is difficult to understand how this mode of reasoning differs from, or is any less legitimate than, the arguments relied upon to justify the governmental protection of any intangible interest.
47. *See, e.g.*, Communist Party v. Subversive Activities Control Bd., 367 U.S. 1, 91 (1961) ("Against the impediments which particular governmental regulation causes to entire freedom of individual action, there must be weighed the value to the public of the ends which the regulation may achieve."); Dennis v. United States, 341 U.S. 494, 517 (1951) (Frankfurter, J., concurring); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 646 (1943) (Frankfurter, J., dissenting).
48. *See, e.g.*, L. TRIBE, *supra* note 10, at 583-84.
49. *Id.* at 577. There is, of course, no reason why under the self-government rationale as interpreted by Professor Tribe, non-political expression should not be accorded intensive rather than deferential substantive due process protection. To reason otherwise is to take unfair advantage of the fact that at the time Professor Meiklejohn sketched his free-speech theory, substantive due process was encased in a pervasive bad odor as a mode of constitutional analysis. *See* A. MEIKLEJOHN, *supra* note 18.

to substantive due process protection, *i.e.*, the same level of protection accorded to an individual's interest in engaging in private consensual homosexual behavior.[50]

The self-government rationale, if properly understood, is broad enough to support a general theory of the first amendment. The problem has been that the proponents of this rationale have fundamentally misconceived the very nature of the concept of self-government in an open, democratic society. Professors Meiklejohn and Kalven interpreted the significance of the first amendment as dependent upon a relationship between freedom of expression and participation in the electoral process: "The people need free speech because they vote."[51] If free expression is important because it facilitates intelligent voting then it is appropriate to suggest, as some followers of Meiklejohn and Kalven have argued, that, as a matter of principle, the protection of the first amendment should be limited to speech which is "concerned with governmental behavior, policy or personnel."[52] Such a formulation suffers, however, not only from the flaw of too narrowly limiting the ambit of first amendment protection for expression,[53] but also from the weakness of tying the fate of the first amendment freedom of expression to a right of electoral participation which has received only uneven judicial protection from the United States Supreme Court[54] and which, at least as to state elections, has no explicit

50. *See* Doe v. Commonwealth's Attorney, 403 F. Supp. 1199, (1975), *aff'd* 425 U.S. 901 (1976). The analogy to the substantive due process protection afforded to abortion is no more analytically satisfying. Ely, *supra* note 17.

51. Kalven, *supra* note 26, at 16. *See also* Meiklejohn, *supra* note 18, at 255 ("Self-government can exist only insofar as the voters acquire the intelligence, integrity, sensitivity, and generous devotion to the general welfare that, in theory, casting a ballot is assumed to express.").

52. Bork, *supra* note 27, at 27. *See also* BeVier, *The First Amendment and Political Speech: An Inquiry Into the Substance and Limits of Principle*, 30 STAN. L. REV. 299 (1978). It should be noted that Professor BeVier, but not Professor Bork, would argue that "[t]here are some specific pragmatic and institutional concerns that justify first amendment rules more ample in scope than would be permissible on grounds of principle alone." *Id.* at 301. Nevertheless, Professor BeVier would grant the first amendment a much more limited scope than that afforded by the United States Supreme Court: "The political speech principle clearly does not protect the kinds of commercial speech involved in advertising prescription drugs, residential housing or legal services." *Id.* at 354. *Compare* Bates v. State Bar, 433 U.S. 350 (1977); Linmark Associates, Inc. v. Willingboro, 431 U.S. 85 (1977); *and* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976); *with* Friedman v. Rogers, — U.S. —, 99 S. Ct. 887 (1979).

53. *See* text accompanying notes 26-30 *supra*.

54. *See, e.g.*, Holt Civic Club v. City of Tuscaloosa, 99 S. Ct. 383 (1978); Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719 (1973); McDonald v. Board of Election Comm'rs, 394 U.S. 802 (1969); Fortson v. Morris, 385 U.S. 231 (1966).

constitutional recognition.[55] Given the founding fathers' limited recognition of voting rights,[56] it is hazardous to view freedom of expression as important only because it facilitates the meaningful casting of the ballot.[57] While I would agree that a unifying free speech theory should be premised on the function of free expression in a self-governing democracy, defining the value of free speech as merely a service right to assure the meaningful exercise of the franchise, fundamentally misconceives the underlying concept of a self-governing people and ignores the historic significance of the Declaration of Independence and the Revolutionary War.

Prior to the Revolutionary War the American people had lived under the governance of Great Britain, a constitutional monarchy, in which the sovereign power existed in the legislative branch of government, the Parliament.[58] Under such a system the struggle between liberty and authority was conceived to be a contest between the government and its subjects, and "liberty . . . meant protection against the tyranny of the political rulers."[59] This strug-

55. *See, e.g.*, Harper v. Virginia Bd. of Elections, 383 U.S. 663, 665 (1966) ("While the right to vote in federal elections is conferred by Art. I, §2, of the Constitution [cite omitted], the right to vote in state elections is nowhere expressly mentioned."); Minor v. Happersett, 88 U.S. (21 Wall.) 162, 178 (1875) ("[T]he Constitution of the United States does not confer the right of suffrage upon any one.").

56. Property qualifications for the franchise were widespread during the colonial period and were not abrogated by the founding fathers. *See* C. WILLIAMSON, AMERICAN SUFFRAGE: FROM PROPERTY TO DEMOCRACY, 1760-1860, at 92-116 (1960). *See also* THE FEDERALIST No. 10 (J. Madison) (J. Cooke ed. 1961). The denial of the franchise on the ground of race was not constitutionally proscribed until 1870. U.S. CONST. amend. XV. The right to vote was constitutionally extended to adult females in 1920. U.S. CONST. amend. XIX. Poll taxes were not outlawed by the Constitution until 1964. U.S. CONST. amend. XXIV.

57. Thus, for example corporations have no right to vote but possess a right of free expression. *See* First Nat'l Bank v. Bellotti, 435 U.S. 765 (1978). Ex-felons have no constitutionally protected right to vote, but their right to free speech may be guaranteed even while incarcerated. Richardson v. Ramirez, 418 U.S. 24 (1974); Procunier v. Martinez, 416 U.S. 396, 425 (1974) (Marshall, J., concurring). So too, children, who possess no right to vote, have a right of free expression. Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969). The right to vote may be restricted on the grounds of political party affiliation, Rosario v. Rockefeller, 410 U.S. 752 (1973), but not the right of free speech. *See* Elrod v. Burns, 427 U.S. 347 (1976).

58. *See* 1 J. BRYCE, STUDIES IN HISTORY AND JURISPRUDENCE 124-215 (1901); A. DICEY, INTRODUCTION TO THE LAW OF THE CONSTITUTION 417-73 (9th ed. 1952); G. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 346-54 (1969). *See also* THE FEDERALIST NO. 53 (J. Madison) 361 (J. Cooke ed. 1961) ("[I]n Great Britain, where the principles of political and civil liberty have been most discussed; . . . it is maintained that the authority of the Parliament is transcendent and uncontroulable (*sic*) . . . .").

59. J.S. MILL, *supra* note 31, at 5. *See also* THE FEDERALIST NO. 84 (A. Hamilton) at 578 (J. Cooke ed. 1961) ("It has been several times truly remarked, that

gle took the form of an attempt to set two types of limitations upon the power of the sovereign government over its subjects: the recognition of certain immunities or "rights" which the sovereign was not to abridge, and the extension of the franchise in order to impose the periodic consent of the subjects as a check upon the authority of the sovereign government.[60] Those who attempt to premise the first amendment guarantee upon the relationship between the value of free speech and the right to vote ultimately rely upon this "Tory" view, wherein the government retains the ultimate sovereignty subject to the consent of the governed at periodic elections. Although such a narrow view of the role of free expression, which limits freedom of speech to a right of the governed to engage in discussions of governmental policies, personnel and institutions in order that they might intelligently exercise the periodic right to vote, might be appropriate in a constitutional monarchy, it is wholly at odds with the American concept of democratic self-government.

The special genius of the democratic form of self-government which our forefathers established and formalized in the United States Constitution was that, in its underlying premise, it was " 'altogether different' from the British form."[61] Indeed, "[o]ur government is founded on much nobler principles,"[62] because in the United States "[t]he people, not the government, possess the absolute sovereignty."[63] Here, "a constitution has become . . . a charter of power granted by liberty rather than, as in Europe, a charter of liberty granted by power."[64] The founding fathers had thus truly revolutionized political thought and created a society in which "the supreme, absolute and uncontrollable authority, *remains* with the people."[65] In America, the people are truly self-governing in the fullest sense of the term: "[I]n such a society, the governors and the governed are not two distinct groups of persons. There is only one group—the self-governing people. Rulers and ruled are the same individuals. We, the People, are our own mas-

bills of rights are in their origin, stipulations between kings and their subjects, abridgments of prerogative in favor of privilege. . . .").

60. *See* J.S. MILL, *supra* note 31, at 5-6; B. BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 173 (1967).

61. New York Times Co. v. Sullivan, 376 U.S. 254, 274 (1964) (quoting 4 J. ELLIOT, DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION 569-70 (1st ed. 1854) (J. Madison)).

62. 4 J. ELLIOT, *supra* note 61, at 9 (J. Iredell).

63. *Id.* at 569-70 (J. Madison). *See also* PENNSYLVANIA AND THE FEDERAL CONSTITUTION 1787-1788, 229 (J. McMaster & F. Stone, eds. 1888) (J. Wilson); *id.* at 250 (J. Smilie); G. WOOD, *supra* note 58.

64. G. WOOD, *supra* note 58, at 601.

65. PENNSYLVANIA AND THE FEDERAL CONSTITUTION, *supra* note 63, at 316 (J. Wilson) (emphasis in original).

ters, our own subjects."[66]

We should not be confused by the fact that the founding fathers established the federal and state governments to exercise some of the governing power in our society. Insofar as the ultimate sovereignty is concerned, "the people divest themselves of nothing,"[67] and government officials and institutions are merely "their servants and agents"[68] and are "*at all times* accountable to them."[69] The people did not grant their sovereignty to the government subject to a periodic electoral check, but rather retained the supreme authority so that they might "new-model their government whenever they think proper."[70] The electoral franchise is thus not the embodiment of the sovereignty of the people but rather merely a mechanism to formalize, channel, and ultimately domesticate, the means by which free people actually govern themselves.[71] It must also be recognized that the people have not transferred the entirety of the governing power to the formal institutions of government. The people granted some of the governing power to the state governments and some to the federal government, and apportioned that power among various agencies of these governmental institutions.[72] More importantly, however, much of the governing power was apportioned to non-governmental institutions[73] and the

66. A. MEIKLEJOHN, *supra* note 18, at 6.

67. 2 J. ELLIOT, *supra* note 61, at 89 (T. Parsons). *See also* 3 J. ELLIOT, *supra* note 61, at 444 (G. Nicholas); PENNSYLVANIA AND THE FEDERAL CONSTITUTION, *supra* note 63, at 318 (J. Wilson): "[I]n this country the supreme, absolute, and uncontrollable power resides in the people at large; . . . they have vested certain proportions of this power in the State governments, but . . . the fee simple continues, resides and remains with the body of the people."

68. 4 J. ELLIOT, *supra* note 61, at 9 (J. Iredell). Benjamin Franklin expressed the notion that government officials are merely the servants of the people with an eloquency which remains unsurpassed:

> It seems to have been imagined by some that the returning to the mass of the people was degrading the magistrate. This he thought was contrary to republican principles. In free Governments the rulers are the servants, and the people their superiors & sovereigns. For the former therefore to return among the latter was not to *degrade* but to *promote* them. And it would be imposing an unreasonable burden on them, to keep them always in a State of servitude, and not allow them to become again one of the Masters.

J. MADISON, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, 371 (1966 ed.) (emphasis in original).

69. PENNSYLVANIA AND THE FEDERAL CONSTITUTION, *supra* note 63, at 250 (J. Smilie) (emphasis added).

70. 4 J. ELLIOT, *supra* note 61, at 9 (J. Iredell); *id.* at 161 (A. Maclaine) ("The people . . . have formed their state governments, and can alter them at pleasure.").

71. *See* J. RAWLS, *supra* note 36, at 222; G. WOOD, *supra* note 58, at 599-600.

72. *See* THE FEDERALIST No. 51 (J. Madison).

73. *Cf.* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .").

remainder was retained by the people themselves.[74] So long as this nation is committed to the principle of democratic self-government, freedom of expression must encompass all issues which are important to the means by which free people govern themselves and not be limited merely to those issues which the people have temporarily assigned to the sphere of the organized institutions of government. This has been clearly recognized by the United States Supreme Court: "Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period."[75]

Of course, democratic self-government is not anarchy: "Free men are not non-governed. They are governed—by themselves."[76] Within the sphere of authority delegated to governmental institutions, the government has the rightful power to regulate the conduct of its citizens. On the other hand, the government, as the mere servant of the people, has no more authority to decide what ideas or messages the people may express, or set the agenda of issues worthy of public discussion, than one's household servant may rightfully dictate which topics of conversation are appropriate at the dinner table. That the government may not so usurp the sovereignty of the people remains true whether the offending governmental agency is the legislature[77] or the judiciary.[78] The over-

74. *See* U.S. CONST. amend. IX ("The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."); U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."); G. WOOD, *supra* note 58, at 283-90; note 67 *supra*.

75. Thornhill v. Alabama, 310 U.S. 88, 102 (1940). Recently, the Court in Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) recognized, in accordance with the thesis of this article, that expression relevant to matters which the people have delegated to the governance of the economic marketplace is necessary to the successful operation of a self-governing democratic society:

> So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable. . . . And if it is indispensable to the proper allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered.

Id. at 765 (citations omitted). *But see* Friedman v. Rogers, — U.S. —, 99 S. Ct. 887 (1979).

76. A. MEIKLEJOHN, *supra* note 18, at 16.

77. *See* Beauharnais v. Illinois, 343 U.S. 250, 270 (1952) (Black, J., dissenting): "[N]o legislature is charged with the duty or vested with the power to decide

riding principle has been aptly stated by Mr. Justice Jackson: "We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority."[79]

III. THE ABSOLUTENESS OF THE FIRST AMENDMENT

The very essence of the first amendment is the unequivocal command that the government is forbidden from attempting to suppress or penalize any communicative activity because it is believed to express an idea or message which is undesirable or unimportant. At the very heart of the first amendment is the unbreachable maxim that the government may not censor false doctrine. This fundamental principle, the absoluteness of the first amendment, is derived from an appreciation of the structural importance and the political purpose of the first amendment in preserving the sovereignty of the people in a self-governing democracy.

The United States Supreme Court has consistently recognized that the first amendment absolutely prohibits the government from burdening communicative activity because the government believes that it expresses an undesirable, inappropriate or unimportant message. Thus, the Court in *Gertz v. Robert Welch, Inc.*, treated the principle as settled doctrine: "We begin with the common ground. Under the First Amendment there is no such thing as a false idea."[80] This principle can be traced in judicial precedent from the earliest cases dealing with freedom of expression. For

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what public issues Americans can discuss. In a free country that is the individual's choice, not the state's."

78. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 346 (1974); Roth v. United States, 354 U.S. 476, 514 (1957) (Douglas, J., dissenting). *See also* H. KALVEN, *supra* note 2, at 45-50; Kalven, *supra* note 26, at 10-13, 18-19.

79. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 641 (1943).

80. 418 U.S. at 339. Unfortunately the majority in *Gertz* then proceeded to negate the value of this insight by declaring, "But there is no constitutional value in false statements of fact." *Id.* at 340. The Court's artificial dichotomy between constitutionally protected expressions of ideas and unprotected false statements of fact obscures the central problem of the complex "mixed utterance." *See* Kalven, *supra* note 26, at 10-13. In *Gertz*, the defendant publisher was expressing a political message concerning an alleged Communist conspiracy to discredit local law enforcement agencies. 418 U.S. at 325. In the course of an effort to alert the public to this alleged conspiracy the defendant's publication made negligent misstatements of fact concerning the plaintiff's alleged role in this conspiracy. *Id.* at 326-27. Insofar as erroneous statements of fact are inevitable in free debate, especially if that debate is to be "uninhibited, robust, and wide-open," *id.* at 340 (quoting *New York Times Co. v. Sullivan*, 376 U.S. at 270), it is frivolous to suggest that, in context, they have "no constitutional value." 418 U.S. at 340. The real issue is whether the harm to the

example, in *United States v. Schwimmer*,[81] Mr. Justice Holmes dissented from the denial of naturalization to a forty-nine-year-old pacifist because of her opposition to the use of violence under any circumstances with the following statement of constitutional principle: "[I]f there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate."[82]

Justice Holmes was not suggesting that the nature of Ms. Schwimmer's beliefs and advocacy of those beliefs immunized her from the denial of naturalization regardless of her ability to satisfy the government's non-speech related qualifications for American citizenship. Rather, his point was that the government's distaste for the content of Ms. Schwimmer's moral, or from the government's point of view political, beliefs and statements was not a constitutionally permissible ground for its action against her.

In *West Virginia State Board of Education v. Barnette*,[83] to choose an example where the court spoke eloquently,[84] Mr. Justice Jackson expressed the absoluteness of the first amendment thusly: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[85]

When the question of the constitutional permissibility of the governmental interest in censoring a message because of its supposed undesirability or inappropriateness has been explicitly presented to the Supreme Court, its uniform response has been to affirm the absoluteness principle in the strongest and most uncompromising language. For example, in *Kingsley International Pictures Corp. v. Regents*,[86] a case which is far removed from the realm of political speech, a motion picture distributor had been denied a license to exhibit the film "Lady Chatterley's Lover" on the grounds that the movie was "immoral."[87] The applicable New York statute, under which the license was denied, defined the term "immoral" to include the portrayal of "acts of sexual immorality, perversion, or lewdness, or which expressly or impliedly presents

plaintiff's individual reputation justifies the governmental penalization of defendant's political message.

81. 279 U.S. 644 (1929).
82. *Id.* at 654-55 (Holmes, J., dissenting).
83. 319 U.S. 624 (1943).
84. *See also* Thornhill v. Alabama, 310 U.S. 88, 104 (1940); Herndon v. Lowry, 301 U.S. 242, 258-59 (1937); De Jonge v. Oregon, 299 U.S. 353, 364-65 (1937).
85. 319 U.S. at 642.
86. 360 U.S. 684 (1959).
87. *Id.* at 685.

such acts as desirable, acceptable, or proper patterns of behavior."[88] Mr. Justice Stewart interpreted the opinion of the New York Court of Appeals upholding the license denial, as rejecting any notion that the film was obscene and relying explicitly on the statutory language to find that the license was properly denied because the film "alluringly [portrayed] adultery as proper behavior."[89] On this premise the court held the New York statute facially unconstitutional as violative of the first amendment's absolute prohibition of governmental censorship on the rationale of distaste for the message expressed:

> What New York has done, therefore, is to prevent the exhibition of a motion picture because that picture advocates an idea—that adultery under certain circumstances may be proper behavior. Yet the First Amendment's basic guarantee is of freedom to advocate ideas. The State, quite simply, has thus struck at the very heart of constitutionally protected liberty.
>
> It is contended that the State's action was justified because the motion picture attractively portrays a relationship which is contrary to the moral standards, the religious precepts, and the legal code of its citizenry. This argument misconceives what it is that the Constitution protects. Its guarantee is not confined to the expresssion of ideas that are conventional or shared by a majority. It protects advocacy of the opinion that adultery may sometimes be proper, no less than advocacy of socialism or the single tax. And in the realm of ideas it protects expression which is eloquent no less than that which is unconvincing.[90]

The New York statute thus "[cut] so close to the core of constitutional freedom" that the Supreme Court had no need to "examine the periphery" of first amendment protection.[91]

In contrast to the crisp reasoning of the majority opinion, we might profitably consider Mr. Justice Frankfurter's concurring opinion, a rare example of explicit repudiation of the absoluteness principle. Initially, Justice Frankfurter argued that the majority had misconstrued the opinion of the New York Court of Appeals by taking a few isolated passages out of context.[92] In light of the fact that the majority's reading of the state court opinion was in accord with the statutory language, that the New York Court explicitly refused to find the movie obscene and made fifteen references to the film's alluring portrayal of adultery as proper or desirable behavior in a fourteen page opinion,[93] it strains credibility to treat the statute as an obscenity regulation or to dismiss the majority's interpretation as based on a "few detached phrases."[94]

88. *Id.*
89. *Id.* at 686-87.
90. *Id.* at 688-89.
91. *Id.* at 689.
92. *Id.* at 695-96 (Frankfurter, J., concurring in result).
93. *Id.* at 700 (Clark, J., concurring in result).
94. *Id.* at 695 (Frankfurter, J., concurring in result).

Mr. Justice Frankfurter, however, had a much more fundamental objection to Justice Stewart's majority opinion. Even assuming that the statute proscribed the expression of an idea on the grounds of legislative disapproval of that idea, Justice Frankfurter refused to agree that the statute would be violative of the first amendment. Rejecting all "abstract and unqualified dogmas about freedom,"[95] he castigated the majority for attempting to "escape the task of deciding whether a particular picture" is constitutionally protected and declared that exercising the judicial power by making such a decision "inheres in the very nature of the judicial enforcement of the Due Process clause," noting that "instance-by-instance, case-by-case application" of that clause could not be avoided.[96] While Justice Frankfurter concurred that this particular film could not constitutionally be denied a license, nowhere does his opinion tell us why this movie was protected or what factors he considered in reaching his decision. Although he insisted that the "balancing" he employed required "the utmost discipline in objectivity" and "the severest control of personal predilictions,"[97] the opinion relied on no ascertainable standards. In short, Justice Frankfurter offered no answer to the criticism of Justice Black that if every Justice must exercise his own independent judgment without the guidance of "reasonably fixed and certain standards" then the process of constitutional adjudication is no more than "a purely personal determination as to whether a particular picture is too bad to allow it to be seen by the public."[98]

The absolute principle that the government cannot burden communicative activity because it believes the message expressed to be false, undesirable, inappropriate or unimportant was also the explicit basis for the United States Supreme Court's invalidation of a federal statute which made criminal the unauthorized wearing of any distinctive part of the uniform of any of the United States armed services unless the person wearing the uniform was portraying a service person in a theatrical or motion picture production and the portrayal did "not tend to discredit that armed force."[99] Mr. Justice Black's majority opinion found the statute unconstitutional on its face on the principled rationale that any statute which permits people to praise a governmental policy but burdens the expression of opposition to that policy "cannot survive in a country which has the First Amendment."[100]

95. *Id.* at 693.
96. *Id.* at 696.
97. *Id.* at 697.
98. *Id.* at 691 (Black, J., concurring).
99. Schacht v. United States, 398 U.S. 58, 59 (1970) (quoting from 10 U.S.C. § 772(f) (1976)).
100. *Id.* at 63. Justice White, joined by Chief Justice Burger and Justice Stewart,

In *Healy v. James*,[101] the President of Central Connecticut State College, a state-supported educational institution, denied official recognition as a campus organization to a group of students who desired to form a local chapter of the Students for a Democratic Society, a 1960's "new left" political society.[102] This denial had the consequence of prohibiting the group access to campus facilities, such as meeting places and bulletin boards, where groups of college students normally communicated among themselves and with other students.[103] Mr. Justice Powell, writing for a majority of the Supreme Court, did not focus on the nature of the first amendment claimant's past and future activities. Instead he approached the case from the perspective of whether the governmental interests relied upon by the college president were constitutionally sufficient to justify the state's burdening of the SDS on the basis of the ideas embraced and espoused by the group.[104] One justification urged for the denial of official recognition to the group was that the president found the group's supposed philosophy of violence and disruption abhorrent and was unwilling to " 'sanction an organization that openly advocates the destruction of the very ideals and freedoms upon which the academic life is founded.' "[105] Mr. Justice Powell emphatically rejected such a rationale:

> The mere disagreement of the President with the group's philosophy affords no reason to deny it recognition. . . . Whether petitioners did in fact advocate a philosophy of "destruction" thus becomes immaterial. The College, acting here as the instrumentality of the State, may not restrict speech or association simply because it finds the views expressed by any group to be abhorrent.[106]

Police Department of Chicago v. Mosley,[107] decided by the Supreme Court on the same day as *Healy*, represents one of the Court's most lucid expositions of the absoluteness of the first amendment. In *Mosley* the Court unanimously invalidated a Chicago ordinance which prohibited all picketing, except peaceful labor picketing, within 150 feet of a school building, on the grounds

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concurred in the result, agreeing that the government could not constitutionally discriminate between theatrical performances on the grounds of whether they do or do not tend to discredit the military, but arguing that it was properly a jury question whether the petitioner, who was convicted for his role in an anti-Vietnam war street skit, was in fact engaged in a "theatrical production" within the meaning of the statute. *Id.* at 69-70.

101. 408 U.S. 169 (1972).
102. *Id.* at 172-79.
103. *Id.* at 176.
104. *Id.* at 185.
105. *Id.* at 187 (quoting an article by Professor James made part of the record below).
106. *Id.* at 187-88.
107. 408 U.S. 92 (1972).

that the selective exclusion of some expression from the public forum solely because of its content is violative of basic constitutional principles.

> [A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content. . . . To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship. The essence of this forbidden censorship is content control. Any restriction on expressive activity because of its content would completely undercut the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open. . . ."
>
> Necessarily, then, under the Equal Protection Clause, not to mention the First Amendment itself, government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities. There is an "equality of status in the field of ideas," and government must afford all points of view an equal opportunity to be heard. Once a forum is opened up to assembling or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone.[108]

It must be clearly understood that Justice Marshall was expressing an absolute first amendment principle which knows no exceptions. Of course, Justice Marshall was not arguing that all governmental regulations of the content of expression are constitutionally impermissible. As Justice Stevens pointed out in *Young v. American Mini Theatres, Inc.*,[109] the Supreme Court has historically upheld certain subversive advocacy, libel and offensive language regulations.[110] The distinction, of course, is that in each of the examples cited the content of the expression itself causes substantive harm which the government has a legitimate interest in preventing. In these cases the Court has determined that the governmental interest in preventing the harm justifies the otherwise constitutionally objectionable regulation of the content of expression. Justice Marshall recognized this clearly, and cogently expressed the absoluteness principle in *Mosley* when he stated that government censorship of communicative activities cannot constitutionally "be justified by reference to content *alone*."[111] Chief Justice Burger also recognized this distinction in his concurring opinion[112] when he expressed his displeasure with portions of Jus-

108. *Id.* at 95-96 (citation and footnote omitted).
109. 427 U.S. 50 (1976).
110. *Id.* at 64-68.
111. 408 U.S. at 96 (emphasis added).
112. *Id.* at 102-03.

tice Marshall's formulation by citing *Roth v. United States*[113] and *Chaplinsky v. New Hampshire*,[114] the two pre-eminent decisions of the Supreme Court endorsing the two level theory in which first amendment protection was denied to certain expression due solely to its supposed lack of social utility or importance.

Professor Karst notwithstanding,[115] it trivializes *Mosley* and threatens serious doctrinal consequences to read that opinion as expressing notions of equality as a central first amendment principle. This is not to say that an equality principle has no significance whatsoever. Indeed, in one sense it is nothing more than an inadequate manner of expressing the absoluteness principle. Thus, it cannot be denied that the Equal Protection Clause can "provide a second line of defense"[116] for first amendment freedoms: an alternative, and less desirable, rationale for invalidating selective exclusions of ideas from public forums. The analytical deficiency of relying on equal protection principles to solve freedom of expression problems is that, under the fourteenth amendment, judicial scrutiny is not triggered absent proof of dissimilar or unequal treatment of *persons* similarly situated.[117] Assuming that Professor Karst succeeds in his equality analysis in shifting the focus of judicial scrutiny from the unequal treatment of persons to the unequal treatment of ideas,[118] his mode of analysis, despite his pro-

113. 354 U.S. 476 (1957).
114. 315 U.S. 568 (1942).
115. *See* Karst, *supra* note 4.
116. Kalven, *The Concept of the Public of the Public Forum*: Cox v. Lousiana, 1965 SUP. CT. REV. 1, 29.
117. *See, e.g.*, G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 667-70 (9th ed. 1975), (quoting Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341, 344-53 (1949)); J. NOWAK, R. ROTUNDA & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 517-19 (1978).
118. This is a difficult sleight-of-hand to justify in equal protection terms and if Professor Karst cannot accomplish it in a principled manner then his equality principle has little applicability beyond the specific problem of selective exclusions from public forums. Professor Karst attempts to accomplish this by importing pre-existing first amendment principles into the notion of equal protection. *See* Karst, *supra* note 4, at 29-35. Absent the incorporation of first amendment principles into equal protection doctrine, Professor Karst's theory would say nothing about whether the government possesses the power to prohibit *all* persons from expressing fighting words or obscenity on the grounds that the content of such expressions lack social utility or importance. *See id.* I would suggest that, at least in this context, masquerading free speech principles as equal protection principles accomplishes nothing but doctrinal confusion. Baker v. Carr, 369 U.S. 186, 297 (1962) (Frankfurter, J., concurring). Moreover, there is unnecessary danger lurking in any effort to make the fate of our first amendment freedoms dependent upon the doctrinal uncertainties of substantive equal protection. *See* Sosna v. Iowa, 419 U.S. 393 (1975); San Antonio Independent School Dist. v. Rodriquez, 411 U.S. 1 (1973); Lindsey v. Normet, 405 U.S. 56 (1972).

tests to the contrary,[119] disastrously threatens to return us to the days when the government could ban *all* expression in public places simply on the ground that the government prefers silence. The history of Supreme Court evaluation of non-content governmental regulation of the time, place, and manner of expression is reflected in the competition between the "equal access" and "guaranteed access" doctrines.[120] It is sadly ironic that at a time when the Court has firmly embraced "guaranteed access" as the appropriate mode of constitutional adjudication in traditional public forums cases,[121] and there is strong pressure for its acceptance in non-traditional public forums cases,[122] the equality principle has been relied upon by the Court in *Hudgens v. NLRB*[123] to justify the exclusion of *all* expression in potential forums. From an equal protection perspective, *Hudgens* is an unexceptional decision since it is hornbook law that under the fourteenth amendment the government can always cure an equal protection violation by merely eliminating the unequal treatment and extending the denial to all.[124] On the other hand, the *Hudgens* rationale is unacceptable under the "guaranteed access" doctrine of the first amendment.[125]

The preferable interpretation of *Mosley* is that it represents one of a long line of Supreme Court precedents, dating back to the earliest free speech cases that came before the Court, which embraced the absolute first amendment principle that the government may not burden an expressive activity because it believes the message to be undesirable, unimportant, or inappropri-

119. *See* Karst, *supra* note 4, at 35-43.

120. *See, e.g.*, Kalven, *supra* note 116; Stone, *Fora Americana: Speech in Public Places*, 1974 SUP. CT. REV. 233.

121. *See, e.g.*, Greer v. Spock, 424 U.S. 828, 835-36 (1976); Grayned v. City of Rockford, 408 U.S. 104 (1972); Hague v. CIO, 307 U.S. 496, 515 (1939).

122. *See, e.g.*, Greer v. Spock, 424 U.S. 828, 843 (1976) (Powell, J., concurring); *id.* at 859-60 (Brennan, J., dissenting); Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969); Brown v. Louisiana, 383 U.S. 131 (1966) (plurality opinion). *But see* L. TRIBE, *supra* note 10, at 684-88. *See also* Stone, *supra* note 120.

123. 424 U.S. 507 (1976).

124. *See, e.g.*, Railway Express Agency, Inc. v. New York, 336 U.S. 106, 112 (1949) (Jackson, J., concurring); Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 41-43 (1972). Professor Karst attempted to avoid this difficulty by reasoning by analogy from a prediction that the Supreme Court would extend the reach of the fourteenth amendment to require official justification for facially neutral governmental action which has racially discriminatory effects. *See* Karst, *supra* note 4, at 37 n.88. This, of course, was a notoriously wrong prediction. *See* Arlington Heights v. Metropolitan Housing Corp., 429 U.S. 252 (1977) (proof of racially discriminatory purpose required); Washington v. Davis, 426 U.S. 229 (1976) (same).

125. *See* notes 120-22 *supra*.

ate.[126]

The constitutional significance of this fundamental first amendment principle can be supported on several grounds in addition to its historic Supreme Court acceptance. Initially, it might be noted that this principle has been central to our national understanding of the role of freedom of expression from the very beginning. It was from such a premise that Milton's *Areopagitica* attacked the practice of prior administrative licensing in 1644. And "Cato," a pseudonym for two of the most influential political theorists of the colonial period in American history,[127] expressed similar thoughts in his widely read and quoted essay "Of Freedom of Speech: That the same is inseparable from Public Liberty":

> Without Freedom of Thought, there can be no such Thing as Wisdom, and no such Thing as public Liberty, without Freedom of Speech, Which is the Right of every Man, as far as by it he does not hurt and controul the Right of another: And this is the only Check it ought to suffer, and the only Bounds it ought to know.[128]

Our forefathers, who emigrated to America in order to escape the tyranny of rulers who had imposed upon the people not only political but also religious orthodoxy, attempted to guarantee by means of a written Bill of Rights that never again would their rulers be empowered to "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion"[129] and enforce that official view by the expedient of punishing heterodox ideas and utterances. That the first amendment was designed to interdict governmental power to punish the expression of any idea or message because of its supposed falsity or undesirability, and not just abolish the crime of seditious libel, is illustrated by the analogy relied upon by Thomas Jefferson to justify the presidential pardon he granted to all those who had been convicted under the 1798 Sedition Act: "I discharged every person under punishment or prosecution under the sedition law, because I considered, and now consider, that law to be a nullity, as absolute and as palpable as if Congress had ordered us to fall down and worship a golden image . . . ."[130]

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126. *Mosley* is also important in establishing that when the government makes a selective exclusion from a public forum its regulation "thus [slips] from the neutrality of time, place, and circumstance into a concern about content," Kalven, *supra* note 116, at 29, and must be invalidated unless the government can meet its heavy burden of proof that the content causes harm which the government is constitutionally empowered to prevent. *See* text accompanying notes 168-171 *infra*.

127. *See* C. ROSSITER, SEEDTIME OF THE REPUBLIC 141 (1953).

128. *Reprinted in* L. LEVY, FREEDOM OF THE PRESS FROM ZENGER TO JEFFERSON 11 (1966).

129. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

130. 8 THE WRITINGS OF THOMAS JEFFERSON 309 (P. Ford, 4th ed. 1897). *See also*

History confirms the fundamental significance of the absoluteness of the first amendment in another sense. The history of our nation, and indeed world history, discloses that government is a notoriously poor judge of the truth or desirability of ideas and messages. This view has perhaps been expressed most eloquently by Justice Harlan: "Any nation which counts the *Scopes* trial as part of its heritage cannot so readily expose ideas to sanctions on a jury finding a falsity."[131] This perception is confirmed by the experience of the South in the period immediately preceeding the Civil War:

> Preachers who criticized the peculiar institution were deprived of their pulpits; teachers who questioned the peculiar institution were driven from their academic posts; editors who opened their papers to questions about slavery lost their jobs, or their papers; books or newspapers which criticized slavery, or even the plantation system, were burned. Intransigent critics were driven out—the Quakers, for example. . . . The result was that the South closed all avenues of escape for itself except the avenue of violence. The South made it all but impossible to work out alternative solutions to the problem of slavery.[132]

More frequently the result of governmental efforts to penalize expression because it is thought to express a heterodox message is simply counter-productive and, rather than successfully suppressing the offending expression, lends credence to the message by bestowing martyrdom upon those who feel the brunt of the government's censorial action: "[S]tamp a man like [Eugene] Debs or a woman like Katy O'Hare as felons, and you dignify the term felony instead of degrading them."[133] The result is that if the government is to achieve the "coercive elimination of dissent" it must inevitably escalate its methods until it ultimately finds itself "elim-

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Letter from Continental Congress to the Inhabitants of Quebec, October 26, 1774, 1 JOURNALS OF THE CONTINENTAL CONGRESS 104 (1904 ed.).

131. Time, Inc. v. Hill, 385 U.S. 374, 406 (1967) (Harlan, J., concurring & dissenting). *See also* Blasi, *The Checking Value in First Amendment Theory*, 1977 A.B.F. RESEARCH J. 521, 550; DuVal, *supra* note 13, at 203-06.

132. Commager, "The Social Function of Dissent," *The Minority of One*, Feb. 1964, *quoted in* H. NORRIS, MR. JUSTICE MURPHY AND THE BILL OF RIGHTS XX n.5 (1965). *See also* A. KELLY, FOUNDATIONS OF FREEDOM IN THE AMERICAN CONSTITUTION 50, 51 (1958):

> A Mussolini leading Italty into war and ultimate ruin; a Japanese military clique planning an attack on the United States which would only result in national disaster; a Politiburo suppressing opposition to the collective farm program and condemning to Siberia biologists who persisted in disbelieving in Lysenko's theories. . . . All these instances support the generalization that closed societies fall into stupid blunders of public policy simply because the right of open discussion and opposition—the right to heresy if you will—has been destroyed.

133. Freund, *The* Debs *Case and Freedom of Speech*, THE NEW REPUBLIC, May 3, 1919, at 15, *reprinted in* 40 U. CHI. L. REV. 239, 242 (1973).

inating dissenters."[134]

In light of these considerations, as well as the classic arguments put forth by John Stuart Mill,[135] it is not surprising that "in a free society all sects and factions, as the price of their own freedom to preach their views, must suffer that freedom in others."[136] Simply stated, tolerance is the price of tolerance and the protection of the first amendment "must be accorded to the ideas we hate or sooner or later they will be denied to the ideas we cherish."[137] In the end, however, the absoluteness of the first amendment is not dependent upon such pragmatic justifications. As Mr. Justice Jackson has explained, the absoluteness of the first amendment is ultimately premised on the very structure of our democratic form of self-government:

> [I]t cannot be the duty, because it is not the right, of the state to protect the public against false doctrine. The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion. In this field every person must be his own watchman for truth, because the forefathers did not trust any government to separate the false for us. . . .
>
> This liberty was not protected because the forefathers expected its use would always be agreeable to those in authority or that its exercise always would be wise, temperate or useful to society. As I read their intentions, this liberty was protected because they knew of no other way by which free men could conduct representative democracy.[138]

IV. UPON RE-READING *NEW YORK TIMES CO. V. SULLIVAN*

In *New York Times Co. v. Sullivan* the United States Supreme Court reversed a $500,000 libel verdict rendered during the height of the struggle to secure racial equality in the South by an Alabama jury in favor of L.B. Sullivan, an elected police commissioner of Montgomery, Alabama, against the New York Times and four

134. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 641 (1943). In support of this observation Mr. Justice Jackson drew upon historical evidence:

> Ultimate futility of such attempts to compel coherence is the lesson of every such effort from the Roman drive to stamp out Christianity as a disturber of its pagan unity, the Inquisition, as a means to religious and dynastic unity, the Siberian exiles as a means to Russian unity, down to the fast failing efforts of our present totalitarian enemies.

Id. at 641.

135. *See* J.S. MILL, *supra* note 31.

136. Kunz v. New York, 340 U.S. 290, 301 (1951) (Jackson, J., dissenting). *See also* J. RAWLS, *supra* note 36, at 205-16.

137. Communist Party v. Subversive Activities Control Bd., 367 U.S. 1, 137 (1961) (Black, J., dissenting).

138. Thomas v. Collins, 323 U.S. 516, 545-46 (1945) (Jackson, J., concurring).

individual defendants.[139] The libel action arose from the publication of an editorial advertisement soliciting funds for the legal defense of Dr. Martin Luther King, Jr., and the furtherance of the civil rights movement. Although the advertisement did not refer to Sullivan by name, it alleged numerous instances of mistreatment of civil rights protestors in Montgomery, Alabama, explicitly and implicitly charged the police with being responsible for the mistreatment, contained numerous factual errors, and could be viewed as unjustifiably injuring Sullivan's reputation in the eyes of some members of the community.[140] The Supreme Court noted that " 'no court of last resort [in the United States] has ever held . . . that prosecutions for libel on government have any place in the American system of jurisprudence,' "[141] and held that "an impersonal attack on governmental operations" cannot, without more, form the basis for an action for libel by the "official responsible for those operations . . . ."[142] Moreover, the first amendment "prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."[143]

A careful re-reading of *New York Times Co. v. Sullivan* discloses a rationale different than the definitional balancing interpretation offered by Professor Nimmer[144] and more expansive than Professor Kalven's interpretation.[145] Rather than starting from the concept of seditious libel as an initial premise, the Supreme Court began with "[t]he general proposition that freedom of expression upon public questions is secured by the First Amendment [which] has long been settled by our decisions."[146] Clarifying the precise meaning of the general proposition the Court explained that the first amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people."[147] It then made explicit the absoluteness of the first amendment: "The constitutional protection does not turn upon 'the truth, popularity, or social utility of the ideas or beliefs

139. New York Times Co. v. Sullivan, 376 U.S. 254 (1964).
140. *Id.* at 256-63.
141. *Id.* at 291 (quoting City of Chicago v. Tribune Co., 307 Ill. 595, 601, 139 N.E. 86, 88 (1923)).
142. *Id.* at 292.
143. *Id.* at 279-80.
144. *See* Nimmer, *supra* note 11.
145. *See* Kalven, *supra* note 18.
146. 376 U.S. at 269.
147. *Id.* (quoting Roth v. United States, 354 U.S. 476, 484 (1957)).

which are offered.' "[148]

The Supreme Court was not holding that *all* expression, or even *all* "political" expression is entitled to absolute first amendment protection. After all, "[p]olitical assassination is a gesture of protest, too, but no one is disposed to work up any First Amendment enthusiasm for it."[149] Any attempt to formulate free expression doctrine by focusing on the nature of the first amendment claimant's activity in an effort to label it expression or action, "speech pure" or "speech plus," or "political" or "non-political" speech, is fundamentally unworkable and analytically poverty-stricken.[150] More importantly, such a focus approaches the process of constitutional adjudication in an analytically backwards fashion, viewing the individual who has engaged in an expressive activity in contravention of a criminal statute or common law tort doctrine as a wrongdoer who, if he is to avoid the consequences of his violation of a presumptively valid exercise of governmental authority, must establish his right to the protective umbrella of an exceptional affirmative defense provided by the Bill of Rights. The disastrous consequences of such a focus on the nature of the first amendment claimant's activity are well illustrated by *Minersville School District v. Gobitis*[151] which upheld the requirement that school children, in contravention of their sincere conscientious beliefs, participate in a daily flag salute ceremony.[152] Such a decision, overruled a brief three years later,[153] was possible only

148. *Id.* at 271 (quoting NAACP v. Button, 371 U.S. 415, 445 (1963)).

149. H. KALVEN, *supra* note 2, at 133. In *Sullivan*, the Supreme Court did not hold the common law of libel wholly unconstitutional, but rather held that a public official could recover damages for defamation upon proof of actual malice. *See* note 143 *supra*.

150. When the approach of focusing on the nature of the litigant's activity manifested itself in the attempted distinction between expression and action or between "speech pure" and "speech plus," Professor Kalven destroyed its analytical premise by pointing out that all expression involves action: "If it is oral, it is noise and it may interrupt someone else; if it is written, it may be litter." Kalven, *supra* note 116, at 23. When this approach manifested itself as the two-level theory whereby certain categories of expression were judicially classified as worthy of first amendment protection and thus labelled "speech," or placed in one of several cubbyholes (designated by opprobrious terms such as obscenity, libel, or fighting words) artificially deemed "non-speech" unworthy of first amendment protection, Professor Kalven again destroyed its analytical premises. *See* H. KALVEN, *supra* note 2, at 45-50; Kalven, *supra* note 26, at 10-13, 18-19. Of course, the attempt to develop a free speech analysis on the foundation of a purported distinction between "political" and "non-political" expression is nothing more than a simplistic application of this discredited two-level theory. *See* BeVier, *supra* note 52; Bork, *supra* note 27.

151. 310 U.S. 586 (1940).

152. *Id.* at 597-98.

153. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

because Justice Frankfurter "*assumed* . . . that power exist[ed] in the state to impose the flag salute discipline upon school children in general" and "only examined and rejected a claim based on religious beliefs of immunity from an unquestioned general rule."[154] When the issue is framed, as it was by Justice Frankfurter, as whether "though the ceremony may be required, exceptional immunity must be given to dissidents,"[155] we can be assured that first amendment rights will not be guarded by "independent tribunals of justice [which will resist] every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights,"[156] but rather as a barrier which must be hurdled by the individual claiming constitutional immunity for expressive activity.

Rather than focusing on the nature of the first amendment claimant's activity, the appropriate constitutional inquiry should be whether the applicable governmental regulation impermissibly abridges the freedom of expression guarantee of the first amendment.[157] The initial constitutional question then is whether the asserted governmental interest is one which the government may, consistently with the first amendment, seek to protect or pursue by the means of burdening expressive activities. This is not the only relevant constitutional inquiry in free speech cases,[158] but it is the primary issue which must be resolved before judicial review can proceed further in a principled manner: "[A]lthough it reaches further, the first amendment certainly *begins* with the constitutionality of legislation. And to that question it should be irrel-

154. *Id.* at 635 (emphasis in original).
155. Minersville School Dist. v. Gobitis, 310 U.S. at 599-600.
156. 1 ANNALS OF CONGRESS 457 (Gales & Seaton eds. 1789).
157. *See generally* Kalven, *supra* note 116; Kalven, *supra* note 18.
158. In addition, it must be determined whether a permissible government interest is sufficiently important to justify the burdening of expression. *See, e.g.*, Cohen v. California, 403 U.S. 15 (1971); United States v. O'Brien, 391 U.S. 367 (1968); NAACP v. Button, 371 U.S. 415 (1963). It must also be determined whether the regulation protects or pursues the permissible governmental interest in a sufficiently efficient manner so that it does not penalize expressive activities which do not seriously threaten the interest the regulation is designed to further. *See, e.g.*, Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975); Gooding v. Wilson, 405 U.S. 518 (1972); Cohen v. California, 403 U.S. 15 (1971); Brandenburg v. Ohio, 395 U.S. 444 (1969). Underlying these considerations is the crucial analytical distinction between regulations of the content of expression and regulations of the time, place and manner of expression. *See* notes 3-8 *supra*. *See also* Kalven, *supra* note 116. Finally, it must be determined whether a causal connection exists between the expressive activity and the harm which the governmental regulation is designed to avert because if no such causal connection exists then the regulation has been applied in such a manner as to constitute a needless restriction on constitutionally protected activities. *See* Ely, *supra* note 3, at 1496-98.

evant whether the conduct of the protesting individual might be constitutionally restrained by a different law."[159]

This methodology of constitutional adjudication not only possesses the pragmatic advantage of avoiding the intellectual unintelligibility of the focus on the nature of the litigant's activity but also accords with the language of the first amendment which by its terms provides that the government, and especially the legislative branch, shall make no regulation which abridges the freedom of expression. It also provides principled guidance to the legislature, to whom the first amendment is primarily addressed, as to the constitutionality of a proposed piece of legislation. "Constitutional law, in its original function antecedent to judicial review" owes the legislature an answer as to whether its decision is "constitutionally right or wrong, in that place and at that time."[160] Finally, a judicial focus on the character of the applicable governmental regulation is much more in accord with our basic intuitions, which are keyed to the legitimacy or illegitmacy of certain officially asserted justifications for the restriction of expressive activities rather than to notions of proper and improper expressive activities. The very idea of attempting to decide free speech cases without reference to the governmental interests asserted in support of an official proscription of the activity at issue is nonsensical. A historical example will serve to illustrate my point.

In 1799, Benjamin Fairbanks, a wealthy farmer and one of the leading citizens of Dedham, Massachusetts, was arrested and convicted for erecting a tall pole, akin to a totem pole, on public property in Clapboardtree's Parish.[161] On first impression this conviction would seem unobjectionable since we might conceive several good and sufficient reasons to support it.[162] Nor would it necessarily change our view if we learned that Fairbanks affixed a sign with a political statement to the pole.[163] I suspect, however,

159. Linde, *"Clear and Present Danger" Reexamined: Dissonance in the* Brandenburg *Concerto*, 22 STAN. L. REV. 1163, 1174 (1970) (emphasis in original).

160. *Id.* at 1178.

161. *See* J. SMITH, FREEDOM'S FETTERS 257-70 (1956).

162. *Compare* State v. Ybarra, 550 P.2d 763 (Or. App. 1976) (affirming conviction for trespass for erecting tent on public property to distribute leaflets) *with* People v. Stover, 240 N.Y.S.2d 734, 12 N.Y.2d 462 (1963) (affirming conviction for erecting clotheslines on defendant's privately owned property for purpose of protesting property tax assessment). *See generally* Lehman v. City of Shaker Heights, 418 U.S. 298 (1974). *See also* Packer Corp. v. Utah, 285 U.S. 105 (1932).

163. *See* J. SMITH, *supra* note 161, at 260. The sign read: "No Stamp Act, No Sedition, No Alien Bills, No Land Tax; downfall to the Tyrants of America, peace and retirement to the President, Long Live the Vice-President and the Minority; May moral virtue be the basis of civil government." *Id.*

that the fact that Fairbanks was convicted, not for violating a state or local trespass-type statute, but for violation of the Federal Sedition Act[164] which proscribed criticism or defamation of the government of the United States,[165] would drastically alter our perception as to the constitutionality of the conviction. And, if we knew that the ultimate evil feared by federal government officials was the electoral success of Thomas Jefferson's opposition political party in the 1800 election[166] then the unconstitutionality of the conviction should be beyond dispute. The distinguishing factor, obviously, is not the nature of the first amendment claimant's activity but the character of the applicable governmental regulation.

The starting point for the Supreme Court's analysis in *New York Times Co. v. Sullivan* was the basic proposition that the governmental interest of burdening expression because of the supposed undesirability, falsity or unimportance of the ideas or message conveyed was absolutely incompatible with the essence of the first amendment.[167] The Court, having established this fundamental proposition, then proceeded to an evaluation of the other interests served by Alabama's tort doctrines of defamation. Here, the two relevant considerations were Alabama's interest in protecting the reputation of its governmental institutions, policies and personnnel and its interest in protecting the individual reputations of its citizens; more particularly in *Sullivan*, the individual reputation of L.B. Sullivan. The problem that the Court was required to confront was that of the "mixed utterance," *i.e.*, expression which not only contributes to the process of self-government through the exchange of information and ideas but which also causes harm which the government has an interest in preventing.[168]

The question then presented was whether the asserted governmental interests could permissibly be recognized consistent with the command of the first amendment. Furthermore, if it were de-

164. *Id.* at 265-66. Fairbanks was sentenced to six hours imprisonment and a fine of $5.00. *Id.* at 266. Others convicted of similar offenses were not treated so leniently. *See id.* at 266-67. Note also, the case of Luther Baldwin who was fined and jailed under the Sedition Act for drunkenly stating, upon the occasion of a military salute to President Adams, that he didn't care if they fired the cannonball through Adam's ass. *Id.* at 270-71. It would hardly contribute to incisive analysis to treat the case as presenting an "offensive language" problem. *Cf.* FCC v. Pacifica Foundation, 438 U.S. 726 (1978) (The Court held that a FCC order holding that the language of the monologue "Filthy Words" broadcast in early afternoon on a radio program was indecent and prohibited by statute, did not violate broadcaster's first amendment rights, even if broadcast was not obscene).

165. 1 Stat. 596-97 (1798).

166. *See* J. SMITH, *supra* note 161, at 263-65.

167. 376 U.S. 254, 269-71 (1964).

168. *See* Kalven, *supra* note 26, at 10-13.

termined that a permissible governmental interest was being asserted, given that the government was attempting to achieve this interest by the presumptively unconstitutional means of intentionally suppressing the expression of information or ideas on the basis of its content, the duty then devolved upon the court to uphold the protection of the valid governmental interest by the narrowest means possible, thereby giving the broadest possible scope to the means by which a free people govern themselves. In *Sullivan* the Supreme Court expressed this methodology eloquently when it stated: "Thus we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[169]

The *Sullivan* majority well understood that not only is it true that "[w]hatever is added to the field of libel is taken from the field of free debate,"[170] but, equally important, the fact that the government desired to prevent the interference with a permissible government interest did not negate its intent to achieve a perhaps laudable end by the constitutionally objectionable means of suppressing expression on the basis of the message it conveyed. The point is not that no governmental interest can support a regulation which burdens the content of expression, but rather that the one who relies on that interest has the heavy burden of affirmatively establishing that it constitutes a constitutionally acceptable justification to excuse a prima facie violation of the first amendment.[171]

The Court's consideration of the governmental interest in protecting its own reputation by the means of penalizing speech critical of government institutions, policies and personnel, led it to recognize that "it must by no means be supposed, because damage, or probability of damage, to the interests of [society or] others can alone justify the interference of society, that therefore it always does justify such interference."[172] In short, there are some

169. 376 U.S. at 270.

170. *Id.* at 272 (quoting Sweeney v. Patterson, 128 F.2d 457, 458, *cert. denied*, 317 U.S. 678 (1942)). *See also* Beauharnais v. Illinois, 343 U.S. 250, 272 (1952) (Black, J., dissenting) ("Every expansion of the law of criminal libel so as to punish discussions of matters of public concern means a corresponding invasion of the area dedicated to free expression by the First Amendment.").

171. 376 U.S. at 271. This view is in accord with established first amendment doctrine. *See, e.g.*, Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975); Gooding v. Wilson, 405 U.S. 518 (1972); Cohen v. California, 403 U.S. 15 (1971); Brandenburg v. Ohio, 395 U.S. 444 (1969). It also draws support from general principles of criminal responsibility. *See* W. LAFAVE & A. SCOTT, HANDBOOK OF CRIMINAL LAW 205-06 (1972). For the role of intent in tort law, see W. PROSSER, HANDBOOK OF THE LAW OF TORTS 31-32 (4th ed. 1971).

172. J.S. MILL, *supra* note 31, at 115.

governmental interests which cannot be protected by suppressing the free expression of ideas and messages without striking at the heart of the conception of free speech in a self-governing democracy. The governmental interest in penalizing seditious libel is such an interest, and was thus deemed by the Supreme Court to be constitutionally impermissible.[173] If such a justification were permitted, the essential sovereignty of the people in a self-governing democracy would be destroyed because, "in Madison's phrase, 'the censorial powers' would be in the Government over the people and 'not in the people over the Government.' "[174]

It should be made very clear here that it is the character of the governmental regulation which is determinative for purposes of first amendment analysis, not the nature of the ultimate governmental interest. Thus, to use the seditious libel example of *New York Times Co. v. Sullivan*, the damage judgment could not stand because the common law of defamation had been used to burden speech critical of the government, not because the government's ultimate interest in perpetuating a favorable reputation for itself was somehow illegitimate or constitutionally impermissible. It simply is not accurate to suggest that *Sullivan* was based on the principle that "government itself, unlike individuals, *has* no legitimate reputational interest: government cannot be defamed."[175] Clearly, the government has a legitimate interest in protecting its reputation and inducing public respect and support for its institutions, policies and officials. Thus, it is certainly legitimate for "the government to inform, explain, and persuade—measures especially crucial in a society that attempts to govern itself with a minimum use of force . . ."[176]—the citizenry of the wisdom and virtue of official policies and personnel.[177]

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173. 376 U.S. at 273-276. In addition, a state may not treat an "impersonal attack of governmental operations" as an actionable libel on the "official responsible for those operations." *Id.* at 292. The Court's reasoning here is instructive: "Raising as it does the possibility that a good-faith critic of government will be penalized for his criticism, the proposition relied upon by the Alabama courts strikes at the very center of the constitutionally protected area of free expression." *Id.*

174. Kalven, *supra* note 18, at 208 (quoting New York Times Co. v. Sullivan, 376 U.S. at 282).

175. L. TRIBE, *supra* note 10, at 643 (emphasis in original).

176. T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 698 (1970).

177. *See, e.g.*, Wooley v. Maynard, 430 U.S. 705, 717 (1977). ("The State is seeking to communicate to others an official view . . . . Of course, the State may legitimately pursue such interests in any number of ways."); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 640 (1943) ("National unity as an end which officials may foster by persuasion and example is not in question."). *See also* Linmark Associates, Inc. v. Willingboro, 431 U.S. 85, 97 (1977).

The question of what constitutional constraints are mandated by the first

The constitutional infirmity in *Sullivan* was not that the ultimate governmental interest in enhancing its own reputation was illegitimate, but rather that the means chosen to achieve this end contravened the freedom of speech clause of the first amendment and were thus impermissible. It was the character of the governmental regulation which violated the first amendment: "the importance of the free-speech provision of the Constitution rests on the rejection of seditious libel *as an offense*."[178] It is the official employment of the government's monopoly on the legitimate use of coercion by means, for example, of its criminal law or tort doctrines to burden expressive activities, that raises the first amendment objection.[179]

A second governmental interest was also offered in *New York Times Co. v. Sullivan* to justify the abridgment of freedom of expression. The Court assumed that this interest, the protection of the reputation of individuals even if they happen to hold positions of public trust, was a constitutionally permissible justification for the penalization of expression of ideas and information.[180] The Court, examining the scope of defamation doctrine necessary to adequately protect this permissible governmental interest, then fashioned the constitutional doctrine that tort recovery could only be had upon proof "that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."[181]

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amendment to limit government expression of official views, or the means used by the government to amplify its expression, is an issue of immense proportions which is beyond the scope of this article. *See, e.g.*, Wooley v. Maynard, 430 U.S. 705 (1977); Spence v. Washington, 418 U.S. 405 (1974); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943). *See also* T. EMERSON, *supra* note 176, at 697-716; L. TRIBE, *supra* note 10, at 588-91.

178. Kalven, *supra* note 18, at 204 (emphasis added).

179. *Cf.* Kalven, *A Commemorative Case Note*: Scopes v. State, 27 U. CHI. L. REV. 505, 517 (1960) ("In brief, a criminal statute is an unfair form of argument.").

180. The Court has consistently *assumed* both the constitutional permissibility and the compelling importance of the governmental interest in the protection of individual reputation and has subjected neither premise to searching inquiry. *See, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323, 341-48 (1974); Curtis Publishing Co. v. Butts, 388 U.S. 130, 153 (1967). Neither premise, I would suggest, is free from doubt. *See, e.g.*, Courtney, *Absurdities in the Law of Slander and Libel*, 36 AM. L. REV. 552 (1902).

181. 376 U.S. at 279-80. The Court reasoned that such a rule had historically proven adequate to protect the governmental interest in a number of states, *id.* at 280, and would assure symmetry with the legal protection afforded public officials for criticism of private individuals. *Id.* at 282-83.

The Supreme Court's recent flirtation with varying the level of first amendment protection depending on the status of the libel action plaintiff, *see* Time, Inc. v. Firestone, 424 U.S. 448 (1976), and Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), has merit only if one accepts the dubious proposition that there is a greater governmental interest in protecting the reputation of a

New York Times Co. v. Sullivan is truly a magnificent first amendment opinion. Reasoning from the premise of the sovereignty of the people in a democratic society dedicated to the principles of self-government, the Court gave explicit recognition to the absoluteness of the first amendment, *i.e.*, that the government is wholly without legitimate power to censorially burden any expressive activity on the grounds that it expresses a message which is officially believed to be undesirable, inappropriate or unimportant. The Court then, recognizing that Alabama was attempting to achieve two permissible governmental interests by the presumptively unconstitutional means of intentionally suppressing the expression of messages on the basis of their content through traditional tort doctrine, proceeded to an evaluation of the particular governmental interests at issue. The first, preventing criticism of government institutions, policies and personnel, was deemed by the Court to be inconsistent with the underlying self-government premise of the first amendment when asserted as a justification for a regulation penalizing the expression of ideas and information and was thus deemed constitutionally impermissible. The second, protecting the reputations of individual citizens, was assumed to be constitutionally permissible but because of the presumptively unconstitutional means chosen by the state to achieve this end, the Court limited the scope of the state regulation to the narrowest possible means necessary to the achievement of the state's permissible purpose. The Court did its work well in *New York Times Co. v. Sullivan.* It would be difficult to imagine an opinion more true to the essential to the meaning of the first amendment and the democratic principles of our form of self-government.

V. CONCLUSION

The purpose of this article has been to identify a core of absolute first amendment protection which the government is constitutionally proscribed from abridging and thereby give principle, perspective and content to first amendment jurisprudence. It is, of course, always easy to extend constitutional protection to a speaker with whom we agree. It is when the speaker's message is abhorrent or when we have little faith in the wisdom of the people to make what we consider intelligent choices as to how they should

private individual than of a public official or public figure. *But see* Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 45-46 (1971) (Brennan, J., dissenting). In addition, it requires the acceptance of the proposition that principled distinctions can be drawn between these categories. *Cf.* Time, Inc. v. Firestone, 424 U.S. 448 (1976) (attempted to define "public figure" for purposes of the *Sullivan* rule, ultimately concluding that the plaintiff was not a "public figure").

govern themselves that the protection of the first amendment becomes a matter of serious dispute. Unfortunately, it is precisely then, when firm legal doctrine is so imperative, that the pragmatic approaches of the *ad hoc* and definitional balancers consistently fail us. In contrast, the thesis of this article has been that the very nature of an open, democratic, self-governing society dictates the fundamental principle that the government is absolutely forbidden to penalize any communicative activity on the grounds that the message conveyed is undesirable, inappropriate, unimportant or false. This is the essential meaning of the first amendment. We, the people, are entitled to no less.